Tan Sri Dato' Nathan a/l Elumalay v Natarajen a/l Manohran

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-23CY-60–11 OF 2018
MOHD JOHAN LEE JC
11 SEPTEMBER 2022

Tort — Defamation — Libel — Whether remarks contained in collage posted by defendant on WhatsApp chat group were defamatory of plaintiff — — Whether defences of justification and fair comment failed as defendant could not prove truth of his allegations or insinuations or whether they were of public interest — Whether plaintiff was entitled to damages based on his standing in society and known public reputation — Whether plaintiff did not have to specifically prove actual damage suffered by his personal and professional reputation in order to obtain damages

The plaintiff was the founder, chairman and group managing director of a group of companies which carried on business both locally and internationally. The defendant was the managing director and shareholder of a company which, at the time of the trial of the instant action, was suing one of the companies in the plaintiff's group for non-payment under a subcontract ('the civil suit'). The defendant admitted posting to a WhatsApp group (the 'DG chat group') a collage made up of several WhatsApp messages exchanged between him and the plaintiff and including a picture of the plaintiff posing in front of a new luxury car he had acquired. In the WhatsApp messages, the defendant, inter alia, asked the plaintiff how long more it would take for the civil suit to be resolved and whether the plaintiff would 'bribe someone to drag this case in the court'. The defendant also insinuated that the plaintiff was enjoying a good life using money that was rightfully payable to his subcontractors. The administrator of the DG chat group ('SP1') said that when he received the collage, he forwarded the same to another WhatsApp chat group named 'politics and public debate' before deleting the original posting made by the defendant in the DG chat group. The collage that was forwarded to the politics and public debate chat group contained some additional sentences in red ('the additional wordings') which the defendant denied making. In the instant defamation suit brought by the plaintiff against the defendant over the remarks that were contained in the impugned posting, the defendant said the reason why he posted the collage on WhatsApp was 'to let the public know about the plaintiff'. The defendant relied upon the defences of justification and fair comment.

Held, allowing the plaintiff's claim, ordering the defendant to pay the plaintiff RM200,000 in damages and to advertise in a local newspaper a full and

unequivocal retraction and apology to the plaintiff; granting the plaintiff an injunction restraining the defendant and his agents or servants from continuing to publish material defamatory of the plaintiff in any manner whatsoever:

(1) The plaintiff had proven on balance of probabilities that the impugned posting of the collage, with or without the presence of the additional wordings in it, were defamatory of him (see para 72).

(2) Even though the defendant's initial posting of the collage to the DG chat group was deleted by SP1 after SP1 had forwarded the posting to the politics and public debate chat group, publication of the defamatory remarks already took place when the defendant made the initial posting to the DG chat group. The defendant never denied making the posting. He only denied writing the additional wordings in the collage. But despite that denial, the defendant never produced the alleged original collage that he had created which did not have the additional wordings (see paras 17 & 19).

(3) The court agreed with the plaintiff that it was a feature in WhatsApp that forwarded messages could not be edited out by the person who had forwarded the messages. Whilst SP1 no longer had in his phone memory the original collage that was posted to the DG chat group by the defendant, SP1 had shown to the court the collage that he had forwarded to the politics and public debate chat group from the DG chat group which clearly showed the collage containing the additional wordings. This was indisputable and the same was corroborated by SP2. The court found both SP1 and SP2 to be reliable witnesses and the evidence to be sound despite the absence of the original posting in the DG chat group. The burden then shifted to the defendant to deny this. He could have produced the original collage that he posted to the DG chat group, but he did not do so. Instead, he merely claimed that his original collage did not contain the additional wordings. Even if the additional wordings were excluded from the collage, the court found that the collage was still defamatory of the plaintiff as the WhatsApp messages contained therein exposed him to hatred and ridicule and were capable of lowering his reputation in the estimation of right-thinking members of society. Notably, one of those messages queried the plaintiff whether he had bribed someone to delay the civil suit (see paras 20–21, 28–31 & 72).

(4) The defendant failed to provide any concrete evidence to support the defences of justification or fair comment. The particulars of justification he had pleaded were baseless insinuations and allegations which had yet to be proven in the civil suit. In addition, there was no evidence to support the allegation that the plaintiff had bribed someone to delay the suit. Similarly, the defence of fair comment failed because it was not proven that the facts on which the comment was based were true. The

defendant did not adduce any evidence to establish that the plaintiff had lied to his subcontractors or had bribed court staff to delay the civil suit or had used for his own benefit monies that were payable to his subcontractors. Further, the impugned posting did not even remotely refer to any matter of public interest (see paras 45, 48, 54, 56 & 58–59).

(5) In a defamation suit, there was no need for the plaintiff to prove the actual damages he had suffered to his reputation due to the defamation. In defamation law, a man's reputation was always presumed to be good and a plaintiff was not required to prove his reputation or to prove that he had suffered any actual loss or damage. In any event, given the plaintiff's standing as a reputable and respectable man in society especially in his professional and business circles and markets, the defendant's allegations against the plaintiff were grave and degrading to his integrity, credibility and personal and professional reputation (see paras 63–64 & 68).

[Bahasa Malaysia summary

Plaintif merupakan pengasas, pengerusi dan pengarah urusan kumpulan syarikat yang menjalankan perniagaan di dalam dan luar negara. Defendan merupakan pengarah urusan dan pemegang saham sebuah syarikat yang pada masa perbicaraan tindakan ini, telah menyaman salah satu syarikat dalam kumpulan plaintif kerana gagal membayar seperti di bawah subkontrak ('saman sivil'). Defendan mengaku memuatnaik di dalam WhatsApp kumpulan ('DG chat group') kolaj yang terdiri daripada beberapa mesej WhatsApp antara dia dan plaintif dan termasuk gambar plaintif di hadapan sebuah kereta mewah baru yang dibeli. Dalam mesej WhatsApp itu, defendan antara lain bertanya kepada plaintif berapa lama masa yang diperlukan untuk saman sivil itu diselesaikan dan sama ada plaintif akan 'merasuah seseorang untuk membawa kes ini ke mahkamah'. Defendan juga membuat sindiran bahawa plaintif sedang menikmati kehidupan mewah menggunakan wang yang berhak dibayar kepada subkontraktornya. Pentadbir ('administrator') DG chat group ('SP1') itu menyatakan bahawa apabila dia menerima kolaj tersebut, beliau telah mengirimkannya kepada satu lagi kumpulan WhatsApp bernama 'politik dan debat awam' sebelum memadam posting asal yang dibuat oleh defendan dalam kumpulan sembang DG. Kolaj yang dikemukakan kepada kumpulan chat politics and public debate mengandungi beberapa ayat tambahan berwarna merah ('perkataan tambahan') yang dinafikan oleh defendan. Dalam saman fitnah ini yang difailkan oleh plaintif terhadap defendan berhubung kenyataan yang terkandung dalam mesej chat tersebut, defendan menghujahkan bahawa alasan dia memuatnaik kolaj itu di WhatsApp adalah 'untuk memberitahu orang ramai mengenai plaintif'. Defendan bergantung kepada pembelaan justifikasi dan komen yang adil.

Diputuskan, membenarkan tuntutan plaintif, memerintahkan defendan untuk membayar gantirugi RM200,000 dan mengiklankan di akhbar

tempatan secara penuh dan tidak bersyarat mengenai permohonan maaf kepada plaintif; membenarkan injunksi plaintif untuk menghalang defendan dan ejen dan pekerjanya untuk terus menerbitkan sebarang bahan fitnah terhadap plaintif dalam apa cara sekalipun:

(1) Plaintif telah membuktikan melebihi imbangan kebarangkalian bahawa penghantaran kolaj yang tidak sopan, dengan atau tanpa kehadiran perkataan tambahan di dalamnya adalah satu fitnah (lihat perenggan 72).

(2) Walaupun penghantaran awal defendan mengenai kolaj itu kepada DG chat group telah dipadamkan oleh SP1 selepas SP1 telah membuat semula penghantaran itu kepada kumpulan kumpulan chat politics and public debate, penerbitan kenyataan fitnah tersebut sudah berlaku apabila defendan membuat penghantaran awal kepada DG chat group. Defendan tidak pernah menafikan membuat penghantaran tersebut. Beliau hanya menafikan menulis perkataan tambahan di dalam kolaj tersebut. Namun di sebalik penafian tersebut, defendan tidak pernah menghasilkan kolaj asal yang dikatakan dibuat tanpa perkataan tambahan (lihat perenggan 17 & 19).

(3) Mahkamah bersetuju dengan plaintif bahawa ciri dalam WhatsApp adalah bahawa mesej yang dihantar tidak dapat diedit oleh orang yang telah menghantar mesej tersebut. Walaupun di dlaam memori telefon SP1 tidak lagi mempunyai kolaj asal yang disiarkan kepada DG chat group oleh defendan, SP1 telah menunjukkan kepada mahkamah bahawa kolaj tersebtu telah dihantar kepada kumpulan *chat politics and public debate* dari DG chat group yang jelas menunjukkan kolaj yang mengandungi perkataan tambahan. Hal ini tidak dapat dipertikaikan dan perkara yang sama disokong oleh SP2. Mahkamah mendapati SP1 dan SP2 merupakan saksi yang boleh dipercayai dan keterangan adalah kukuh walaupun tiada penerbitan asal dalam DG chat group. Beban pembuktian beralih kepada defendan untuk menafikannya. Dia boleh mengemukakan kolaj asal yang dihantar ke DG chat group, tetapi dia tidak melakukannya. Sebaliknya, dia hanya mendakwa bahawa kolaj asalnya tidak mengandungi perkataan tambahan. Walaupun perkataan tambahan itu dikecualikan daripada kolaj tersebut, Mahkamah mendapati kolaj tersebut masih memfitnah plaintif kerana mesej WhatsApp yang terkandung di dalamnya mendedahkan beliau kepada kebencian dan cemuhan serta mampu menjatuhkan reputasinya dalam kalangan masyarakat yang munasabah. Terutamanya salah satu mesej tersebut mempersoalkan plaintif sama ada beliau telah merasuah seseorang untuk menangguhkan saman sivil tersebut (lihat perenggan 20–21, 28–31 & 72).

(4) Defendan gagal memberikan sebarang bukti yang kukuh untuk menyokong pembelaan justifikasi atau komen yang adil. Butiran justifikasi yang dikatakan sebagai sindiran tidak berasas dan tuduhan

yang masih belum dibuktikan dalam saman sivil tersebut. Selain itu, tiada bukti untuk menyokong dakwaan bahawa plaintif telah merasuah seseorang untuk menangguhkan saman tersebut. Begitu juga pembelaan komen yang adil tidak boleh dipertahankan kerana ianya tidak membuktikan fakta-fakta di mana komen tersebut adalah benar. Defendan tidak mengemukakan sebarang bukti bahawa plaintif telah berbohong kepada subkontraktornya atau telah merasuah kakitangan mahkamah untuk menangguhkan saman sivil tersebut atau menggunakan wang untuk kepentingannya sendiri dengan tidak membayar kepada subkontraktornya. Selanjutnya, penerbitan yang tidak tepat itu bukanlah untuk kepentingan awam (lihat perenggan 45, 48, 54, 56 & 58–59).

(5) Dalam saman fitnah, tiada keperluan untuk plaintif membuktikan ganti rugi sebenar yang telah dialami terhadap reputasinya akibat fitnah tersebut. Dalam undang-undang fitnah, reputasi seseorang sentiasa dianggap baik dan plaintif tidak perlu membuktikan reputasinya atau membuktikan bahawa beliau telah mengalami sebarang kerugian atau kerosakan sebenar. Dalam apa jua keadaan, memandangkan kedudukan plaintif sebagai seorang yang bereputasi baik dan dihormati dalam masyarakat terutama dalam kalangan profesional dan perniagaan serta pasarannya, tuduhan defendan terhadap plaintif adalah berat dan merendahkan integriti, kredibiliti serta reputasi peribadi dan profesionalnya (lihat perenggan 63–64 & 68).]

Cases referred to

Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371, CA (refd)

Chua Jui Meng v Hoo Kok Wing & Anor [2000] 3 MLJ 1, HC (refd)

Dato' Sri Dr Mohamad Salleh bin Ismail & Anor v Nurul Izzah bt Anwar & Anor [2018] 3 MLJ 726, CA (refd)

Dato' Sri Mohd Najib bin Tun Hj Abdul Razak & Anor v Mohd Rafizi Ramli and another appeal [2018] 1 MLJ 295, CA (refd)

Datuk Harris Mohd Salleh v Datuk Yong Teck Lee (sued in his personal capacity and as an officer of the second respondent) & Anor [2017] 6 MLJ 133; [2018] 1 CLJ 145, FC (refd)

Datuk Seri Anwar bin Ibrahim v Wan Muhammad Azri bin Wan Deris [2014] 9 MLJ 605, HC (refd)

Denis O'Brien, plaintiff v Mirror Group Newspapers Ltd, Piers Morgan, Neil Leslie and Karl Brophy, defendants [2001] 1 IR 1, SC (refd)

Dr Chong Eng Leong v Tan Sri Harris bin Mohd Salleh [2017] 4 MLJ 611, CA (refd)

Hasnul bin Abdul Hadi v Bulat bin Mohamed [1978] 1 MLJ 75 (refd)

Henry Wong Jan Fook v John Lee & Anor [1976] 1 MLJ 231, FC (refd)

Institute of Commercial Management United Kingdom v New Straits Times Press

(Malaysia) Bhd [1993] 1 MLJ 408, HC (refd)
JB Jeyaretnam v Goh Chok Thong [1985] 1 MLJ 334 (refd)
John v MGN Ltd [1997] QB 586, CA (refd)
Jones v Skelton [1963] 3 All ER 952, PC (refd)
Lucas-Box v News Group Newspapers Ltd; Lucas-Box v Associated Newspapers Group plc and others [1986] 1 All ER 177, CA (refd)
MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun [1995] 2 MLJ 493; [1995] 2 CLJ 912, FC (refd)
Mahadevi Nadchatiram v Thiruchelvasegaram Manickavasegar [2001] 3 CLJ 65, CA (folld)
Prem Anand Loganathan v Dhinagaran Jayabalan [2016] MLJU 1149, HC (refd)
Raveychandran s/o Goonydo v Datuk Abdul Kadir Jasin & Anor and another action [1997] MLJU 344; [1997] 3 CLJ Supp 68, HC (refd)
Syarikat Bekalan Air Selangor Sdn Bhd v Tony Pua Kiam Wee [2015] 6 MLJ 187, FC (refd)
Tan Sri David Chiu Tat-Cheong v Seema Elizabeth Isoy [2021] MLJU 1426, HC (distd)
Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors [1996] 1 MLJ 393, HC (refd)
Turner v Metro-Goldwyn Mayer Pictures Ltd [1950] 1 All ER 449, HL (refd)
Wong Ling Biu v Teng Ung Woo & Anor [2015] MLJU 353; [2015] 1 LNS 1105, HC (refd)
Wong Yoke Kong & Ors v Azmi M Anshar & Ors [2003] 4 MLJ 96, HC (refd)
Yokomasu Marketing Sdn Bhd & Anor v Chor Tse Min [2018] 2 MLJ 654, CA (refd)

Legislation referred to

Defamation Act 1957 ss 8, 9
Rules of Court 2012 O 78 r 3, 3(2)

Rueben Mathiavaranam (with Angeline Tan) (Suflan TH Liew & Partners) for the plaintiff.
Manoharan Malayalam (with Dyna-Sri Samadass) (M Manoharan & Co) for the defendant.

Mohd Johan Lee JC:

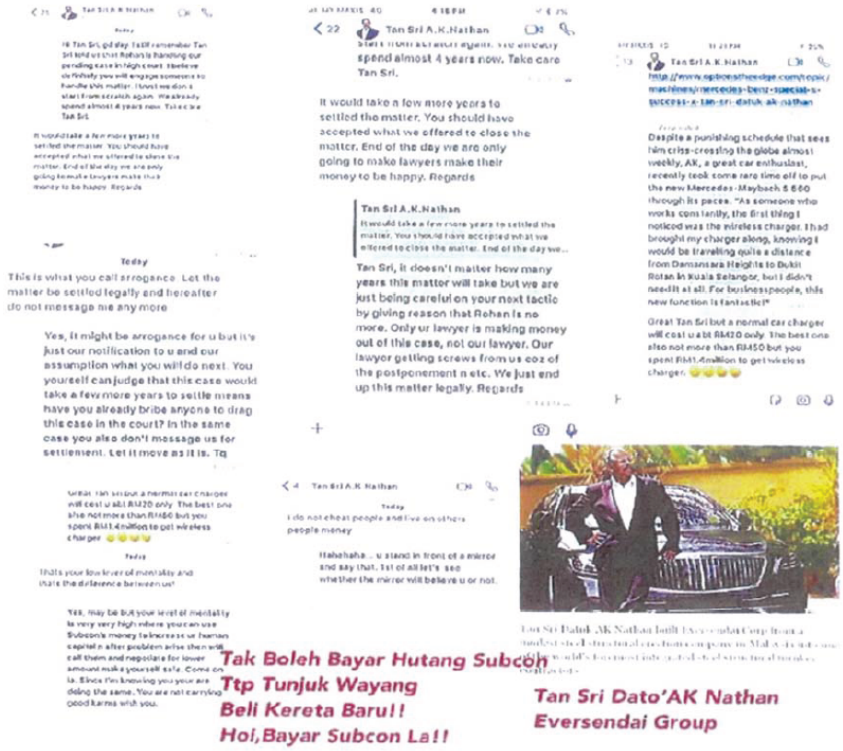
INTRODUCTION

[1] The plaintiff in this case filed this claim ('this claim') for damages against the defendant for a picture collage which consists of a few WhatsApp messages exchange between him and the defendant ('the impugned posting').

Background facts

[2] The plaintiff is the founder, Chairman and Group Managing Director of Eversden Group of Companies. Meanwhile, the defendant is the Managing Director and one of the shareholders of Linus Engineering Sdn Bhd. It is known that there was a civil suit ('the civil suit') initiated by Linsun Engineering Sdn Bhd against Shin Eversendai Engineering (M) Sdn Bhd, a subsidiary of Eversensai Group of Companies on the dispute of a non-payment under a subcontract entered by them.

[3] The crux of this claim is that the impugned posting created and posted by the defendant is deemed to be defamatory against the plaintiff. For ease of reference, the impugned posting is produced as follows:


Tan Sri A.K.Nathan
spend almost 4 years now. Take care Tan Sri.
It would take a few more years to settled the matter. You should have accepted what we offered to close the matter. End of the day we are only going to make lawyers make their money to be happy. Regards
Tan Sri A.K.Nathan
Tan Sri, it doesn't matter how many years this matter will take but we are just being careful on your next tactic by giving reason that Rohan is no more. Only ur lawyer is making money out of this case, not our lawyer. Our lawyer getting screws from us coz of the postponement n etc. We just end up this matter legally. Regards
Teddy
This is what you call arrogance. Let the matter be settled legally and hereafter do not message me any more
Yes, it might be arrogance for u but it's just our notification to u and our assumption what you will do next. You yourself can judge that this case would take a few more years to settle means have you already bribe anyone to drag this case in the court? In the same case you also don't message us for settlement. Let it move as it is. Tq
Tak Boleh Bayar Hutang Subcon
Ttp Tunjuk Wayang
Beli Kereta Baru!!
Hoi, Bayar Subcon La!!
Tan Sri Dato'AK Nathan
Eversendai Group

[4] The impugned posting was allegedly posted to a WhatsApp group called DG chat group ('the DG chat group'). The DG chat group was administrated by one Dato' Gopinath a/l Supramaniam who was the plaintiff's

first witness ('SP1'). SP1 asserted that after the collage was received in the DG chat group, he had forwarded the impugned posting to another WhatsApp chat group named 'politics & public debate' ('the politics & public debate chat group') before deleting the impugned posting in the DG chat group.

[5] The plaintiff contended that the impugned posting was capable of being treated as defamatory against him. However, the defendant denied that the impugned posting was created by him and thus no publication was ever made.

[6] Unsatisfied with the defendant's response, the plaintiff filed this claim against the defendant. The plaintiff was seeking, in essence, damages from the defendant, a written public apology, and an injunction to prohibit the defendant from further authoring or publish any defamatory statement about the plaintiff.

The trial

[7] The plaintiff called eight witnesses during the trial while the defendant called one witness, respectively:

(a) SP1 Dato' Gopinanth Supramaniam;

(b) SP2 Datuk Phupatrai Mansukhlal Premji;

(c) SP3 Thirumaren Munisamy;

(d) SP4 Vijaya Kumaran Danapalan;

(e) SP5 Mahendran Gnasamoothy;

(f) SP6 Gavin Jay Anand Ail Jayapal;

(g) SP7 Tan Sri Dato' Nathan Ail Elumalay SP8 Ganasan Arumugam; and

(h) SD1 Dato' Natarajen Ali Manohran.

Issues

[8] Before the commencement of the trial, the parties had agreed on the following issues to be tried:

(a) whether the defendant had published or caused to be published the impugned posting referred to in para 24 of the re-re-amended statement of claim ('the SOC');

(b) whether the impugned posting referred to in para 24 of the SOC, is a publication of and concerning the plaintiff;

(c) whether the words complained of set out in annexure B of the SOC

forming the impugned posting are capable of bearing the defamatory meaning(s) pleaded respectively under para 29 of the SOC;

(d) whether the defendant is entitled to rely on the defence of justification?

(e) whether the defendant is entitled to rely on the defence of fair comment on a matter of public interest?

(f) whether in publishing the words complained of the defendant was motivated by express malice; and

(g) whether the plaintiff is entitled to the reliefs prayed for?

DECISIONS AND FINDINGS OF THE COURT

[9] After perusing the cause papers, the witnesses' statements, the notes of proceedings, the written and oral submissions, and the parties' replies, I allow the plaintiff's claim. Herein are my reasons.

[10] It is trite in any defamation action that, a plaintiff will need to establish the following to succeed in his claim for defamation:

(a) that the words were defamatory;

(b) that the words referred to the plaintiff; and

(c) that the words were published to third parties.

[11] In the current case, there is no dispute that the impugned posting was indeed referring to the plaintiff. Thus, I will only focus and discuss on the first and third elements accordingly.

Whether the impugned posting was posted by the defendant?

[12] It is a fundamental principle that in any defamation action the defamatory statement or words must be communicated or published to a third party in such a manner so as to be capable of conveying its defamatory meaning. As articulated by His Lordship Abang Iskandar JCA (now CJSS) in *Dr Chong Eng Leong v Tan Sri Harris bin Mohd Salleh* [2017] 4 MLJ 611 at p 622 para [33]:

> The law on publication in the context of the tort of defamation is, in fact, clear. It is this. For there to be defamation, *there must be first be established the factum of publication to at least a third party in respect of the impugned defamatory statement. A communication to the two parties, namely the speaker and the listener, can never amount to a defamation of the listener's reputation as there is no publication of the same to a third party. In the absence of a third party, no reputation can be in jeopardy of being tarnished. So, publication of the defamatory statement is an essential element to be established in the tort of defamation*. (Emphasis added.)

[13] The plaintiff submitted that there was such publication since the impugned posting was sent to the DG chat group by the defendant. This fact was testified by SP1 during cross-examination:

[NOP, Part A p. 18]

MM: C1, page 1. Is this the collage that you received? Is this the one?

GOPI: Yes, this is what came in my group

MM: Sorry, is this the one that you received in your

GOPI: Group, yes.

[14] SP2 during cross-examination also narrated that he received the impugned posting through the DG chat group:

[NOP, Part A p. 90]

MM: Yes. Question is doing you receive this on your phone?

PHUPHAT: My, the WhatsApp group, DG WhatsApp group, yes.

MM: Do you have evidence to show that you received this?

PHUPHAT: No, I don't have that particular sort of messages because every few days I delete because there's so many messages every day.

MM: So, am I right to say that you don't have —

PHUPHAT: No, I don't have.

...

MM: Not there. So, you can't really confirm this is the exact, look at, this is the exact collage, you call this collage, allegation is the collage. This is the exact thing that you received.

PHUPAT: No, I can confirm this was what I received, I can confirm that.

[15] Despite the above testimony, the defendant submitted that there was no actual evidence to support that he was the one who published the impugned posting to the DG chat group. However, according to his own admission, he did post the impugned posting into a WhatsApp group. The defendant during cross-examination said this:

[NOP, Part C p. 31]

RM: Kamu telah mereka cipta kolaj WhatsApp ini.

NATARAJ: Ya

RM Kamu kemudiannya telah memasukkannya dalam WhatsApp chat group.

NATARAJ: Ok

RM: Apakah sebab kamu membuat demikian?

NATARAJ: Untuk orang umum tahu mengenai Plaintif lah.

RM: Oh, untuk membagitahu orang umum tahu mengenai Plaintif?

NATARAJ Ya.

[16] In the present case, the impugned posting consists of WhatsApp messages exchange messages between the plaintiff and the defendant. There were also additional wordings mentioning that 'Tak Boleh Bayar Hutang Subcon Ttp Tunjuk Wayang Beli Kereta Baru!! Hoi Bayar Subcon La!!' and 'Tan Sri Dato' AK Nanthan Eversendai Group' ('the additional wordings') written in red on the impugned posting.

[17] The circumstance here is a bit peculiar. This is because the impugned posting was allegedly posted to the DG chat group but later deleted by SP1. But, before he deleted it, he forwarded the impugned posting to another WhatsApp group ie, the politics & public debate chat group. It is my finding that there was a publication by the defendant when he posted the impugned posting to the DG chat group. This court note that during trial and in his admission, the defendant only mentioned a WhatsApp messaging group in general and that this 'WhatsApp group consisted of the defendant's business friends. However, it is safe to surmise that the WhatsApp group is the DG chat group. While arguing in para 17.4 of the defendant's amended statement of defence that the alleged impugned posting posted in the politics & public debate chat group was different from the one that he had posted in the earlier WhatsApp chat group, the defendant only denied writing the additional wordings in the impugned posting. In view that in para 17.3 of the defendant's amended statement of defence he referred to para 24(a) of the SOC, which mentioned the 'DG chat group', it is safe and clear that the WhatsApp messaging group he mentioned is indeed the 'DG chat group'. This was also never denied by the defendant in para 17.3 of the defendant's amended statement of defence.

[18] Paragraphs 17.2, 17.3 and 17.4 of the defendant's amended statement of defence say:

17.2 Defendan menyatakan bahawa Defendan telah membuat kolaj gambar dengan hanya menggunakan Bahasa Mesej WhatsApp di antara Plaintif dan Defendan seperti di Perenggan 21 Pernyataan Tuntutan dan gambar Plaintif bersama dengan sebuat kereta. Defendan telah memperoleh gambar tersebut daripada sumber laman web www.optionstheedge.com/topic/machines/mercedes-benz-special-s-success-tan-sri-datuk-ak-nathan dan bukannya rekaan Defendan di mana gambar dan maklumat mengenai pembelian kereta tersebut oleh Plaintif telah disiarkan kepada masyarakat umum melalui laman web tersebut. Defendan telah meletakkan dan/atau menghantar kolaj gambar yang mengandungi

balasan mesej WhatsApp beserta gambar Plaintif bersama kereta tersebut kepada satu kumpulan WhatsApp (WhatsApp Group) yang mana ahli-ahli kumpulan tersebut adalah hanya terdiri daripada rakan-rakan perniagaan Defendan.

17.3 Defendan menyatakan bahawa kolaj gambar tersebut yang dibuat dan dihantar oleh Defendan di dalam kumpulan WhatsApp tersebut tidak mengandungi apa-apa kenyataan fitnah dan/atau libel seperti yang diplidkan oleh Plaintif di dalam Perenggan 24(a) Pernyataan Tuntutan Terpinda Semua tersebut. Defendan menafikan dakwaan Plaintif dan menyatakan bahawa Defendan menafikan dakwaan Plaintif dan menyatakan bahawa Defendan tidak mempunyai pengetahuan dan tidak meletakkan dan/atau menulis ayat 'Tidak Boleh Bayar Hutang Subcon Ttp Tunjuk Wayang Beli Kereta Baru!! Hoi, Bayar Subcon La!!' di dalam kolaj gambar yang dihantar di dalam Kumpulan WhatsApp.

17.4 Defendan sesungguhnya memplidkan bahawa kolaj gambar yang dilampirkan oleh Plaintif di dalam Lampiran A, Pernyataan Tuntutan Terpinda tersebut adalah bukan kolaj gambar asal yang dihantar oleh Defendan.

[19] As mentioned previously, the defendant contended that the additional wordings was not written by him, but the rest of the collage was his creation. Hence, the impugned posting forwarded by SP1 was not his. Despite his denial, he has never produced the alleged 'original' impugned posting without the additional wordings.

[20] On this issue, I agree with the plaintiff's submission that it is a feature in WhatsApp that forwarded messages cannot be edited out by the person who forwards such message. SP1 as the DG chat group administrator has confirmed that the impugned posting was received by him and immediately forwarded by him to the politics & public debate chat group. While SP1 is no more having in his phone memory the original posting in the DG chat group, he has shown to this court the original of the impugned posting (in the politics & public debate chat group) in his phone during his testimony which clearly showed that the impugned posting (with the collage carrying the additional wordings in it) is indeed as forwarded. I find this undisputable. The same was also collaborated by SP2. I find both of these witnesses reliable and that the evidence is sound despite the absence of the original posting. The burden then shifts to the defendant to deny this. He could do so by producing his original collage or the original of his posting. He has not done so. Instead, he admits that the impugned posting minus the additional wordings is his creation. The safe conclusion here is that the impugned posting is indeed as per the posting of the defendant to the DG chat group.

[21] It is to be noted that, as will be discussed shortly after this, it is my finding that the impugned posting, with or without the additional wordings, is defamatory against the plaintiff.

[22] Nonetheless, I agree with the defendant that there is no evidence to say he had posted the impugned posting to the other WhatsApp group ie, the politics and public debate chat group. Indeed, SP1 had admitted this in his testimony that he had forwarded the impugned posting to the politics & public debate chat group. Therefore, in my view, the publication made by the defendant only with respect to the DG chat group. Any publication after that by SP1 was the republication by SP1 and not the defendant.

[23] Thus, in answering this key issue, the publication of the impugned posting up to the posting in DG chat group is indeed by the defendant.

Whether the impugned posting is defamatory

[24] For the impugned posting to be defamatory, the plaintiff must prove that the impugned posting tends to lower the plaintiff in the estimation of right-thinking members of society (see *Jones v Skelton* [1963] 3 All ER 952; *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371; *Datuk Seri Anwar bin Ibrahim v Wan Muhammad Azri bin Wan Deris* [2014] 9 MLJ 605).

[25] Further, in *Wong Yoke Kong & Ors v Azmi M Anshar & Ors* [2003] 4 MLJ 96 it was held that the court must firstly, consider the meaning that the words could convey to the ordinary person and secondly, ascertain that if the words were published, a reasonable person and would likely understand them in a defamatory sense.

[26] Therefore, the key question to be answered in this case is: what would an ordinary reasonable reader construe the impugned posting to mean? Would the impugned posting expose the plaintiff to hatred, ridicule, and detestation in the mind of a reasonable reader or would it tend to lower the plaintiff in the estimation of right-thinking society generally? To explore this, the WhatsApp messages exchange must be analysed. The WhatsApp messages exchange between the parties (as they appear in the impugned posting), and the timing are as stated in the table below:

The text messages by the defendant	The replies of the messages by the plaintiff
'1345: Hi Tan Sir, gd day. I still remember Tan Sri Told us that Rohan is handling our pending case in high court. I believe definitely you will engage someone to handle this matter. I trust we don't start from scratch again. We already spend almost 4 years now. Take care Tan Sri'.	'1528: It would take a few more years to settled the matter. You should have accepted what we offered to close the matter. End of the day we are only going to make lawyers make their money to be happy. Regards'.
'1614: Tan Sri, it doesn't matter how many years this matter will take but we are just being careful on your next tactic by giving reason that Rohan is no more. Only ur lawyer is making money out of this case, not our lawyer. Our lawyer getting screws from coz of the postponement n etc. We just end up this matter legally. Regards'.	'1629: This is what you call arrogance. Let the matter be settled legally and hereafter do not message me any more'.
'1632: Yes, it might be arrogance for u but it's just our notification u and our assumption what you will do next. You yourself can judge that this case would take a few more years to settle means have you already bribe someone to drag this case in the court? In same case you also don't message us for settlement. Let it move as it is. Tq'.	

The text messages by the defendant	The replies of the messages by the plaintiff
'2319: http://www.optionstheedge.com/topic/machines/Mercedes-benz-special-s-success-x-tan-sri-datuk-ak-nanthan Despite a punishing schedule that sees him criss-crossing the globe almost weekly, AK, a great car enthusiast, recently took some rare time off to put the new Mercedes-Mayback S 560 through its paces. 'As someone who works constantly, the first thing I noticed was the wireless charges. I had brought my charged along, knowing I would be travelling quite a distance from Damansara Heights to Bukit Rotan in Kuala Selangor, but I didn't need it at all. For businesspeople, this new function is fantastic!' Great Tan Sri but a normal car charger will cost u abt RM20 only. The best one also not more than RM50 but you spent RM1.4 million to get wireless charges'. (4 images)	'0004: Thats your low level of mentality and that the difference between us!'
'0725: Yes, may be but your level mentality is very high where you can use Subcon's money to increase ur human capital n after problem arise then will call them and negotiate for lower amount make yourself safe. Come on la. Since I'm knowing you your are doing the same. Your are not carrying good karma with you'.	'0740: I do not cheat people and live on others people money'
'0740: Hahahaha ... u stand in front of a mirror and say that. 1st of all let's see whether the mirror will believe u or not'	

[27] The defendant argued that the plaintiff had never proven to this court that the impugned posting had lowered the plaintiff's reputation in the estimation of right-thinking members of society and exposed the plaintiff to hatred, contempt, or ridicule. With due respect, I disagree with the defendant's contention.

[28] Firstly, from my reading of the impugned posting, I agree that it would expose the plaintiff to hatred and ridicule, and it would certainly be capable of lowering the plaintiff reputation in the estimation of right-thinking society. In the Court of Appeal of *Yokomasu Marketing Sdn Bhd & Anor v Chor Tse Min* [2018] 2 MLJ 654 it was held at para [25] by His Lordship Asmabi Mohamad JCA:

> In order to ascertain if the words complained of a defamatory of the plaintiff, one has to examine *if the words complained of in their natural and ordinary meaning 'impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part.' If the answer is the affirmative, the words complained of is defamatory.* (Emphasis added.)

[29] This is because, looking at the impugned posting (even without the additional wordings) as a whole, it is clear that the use of words by the defendant in his messages were defamatory. The plaintiff premised that the context of the defendant's messages was as follows:

(a) the plaintiff cannot be trusted and is dishonest;

(b) the plaintiff is foolish for spending RM1.4m to purchase a wireless charger when he purchased the Mercedes-Mayback car;

(c) the plaintiff had cheated his subcontractor and other subcontractors and is in the habit of doing so;

(d) the plaintiff utilised monies that were meant to pay his subcontractor for the purposes of enriching himself;

(e) the plaintiff had deliberately used monies meant for paying his subcontractor to purchase a Mercedes-Benz-Maybach car but not pay his subcontractor;

(f) the plaintiff shows off when he purchased a new Mercedes-Maybach car but is unable to pay his subcontractor;

(g) the plaintiff would deliberately refuse to pay his subcontractors and would then force them into accepting lower sums of money as payment;

(h) the plaintiff lacks integrity, is calculative, manipulative, scheming and insincere; and

(i) the plaintiff is unethical, unprincipled, and immoral in his conduct and is untruthful, untrustworthy and is a liar.

[30] Most notably, in one of the WhatsApp exchange messages, the defendant stated as follows:

> ... You yourself can judge that this case would take a few more years to *settle means have you already bribe someone to drag this case in the court*?

[31] In this message, the defendant queried whether the plaintiff had bribed someone concerning the civil suit. The learned counsel of the defendant contended that the above statement was to reply to the plaintiff's previous message. Be that as it may, I find that any ordinary reader can interpret that as a veiled remark that the plaintiff had bribed someone. This is a very serious and grave suggestion made by the defendant.

[32] The plaintiff cited the case of *Wong Ling Biu v Teng Ung Woo & Anor* [2015] MLJU 353; [2015] 1 LNS 1105 where Lee Heng Cheong J held as follows:

> [17] A perusal of above paragraph revealed that the sting of the libel is 'bribery' and the words complained of, carry a clear imputation of dishonestly or corruption ...
>
> [19] It is immaterial and irrelevant what the publisher intended the words complained of to mean and what the readers understood the words complained of to mean for the purpose of deciding the ordinary and natural meaning of the words complained of. There is no necessity for a plaintiff to prove the falsity of the words complained of once they are found to be defamatory of the plaintiff, because falsity is presumed by law.
>
> [20] This court finds that the words complained of in the present case, carry the strong imputation that the plaintiff was dishonest or was guilty of committing corrupt practice of bribery in the election, which was a criminal act.

[33] While admitting to the WhatsApp messages exchange, the defendant denied that the additional wordings were ever written by him. SD1, namely the defendant himself, in his witness statement said this:

> [SD1's Witness Statement, Q17]
>
> S: Adakah kamu telah mereka dan menyebarkan suatu kolaj gambar Balasan Mesej WhatsApp diantara anda dengan Plaintif tersebut?
>
> *J: Saya telah satu membuat satu kolaj gambar dengan hanya menggunakan Bahasa Mesej WhatsApp di antara Plaintif dan saya, dengan gambar Plaintif bersama dengan sebuah kereta*. Saya telah memperoleh gambar tersebut daripada sumber lamanweb www.optionstheedge.com/topic/machines/mercedes-benz-special-s-succestan-sri-datuk-ak-nathan dan bukannya rekaan saya di mana gambar dan maklumat mengenai pembelian kereta tersebut oleh Plaintif telah disiarkan kepada masyarakat umum melalui laman web tersebut.
>
> *Saya telah meletakkan dan/atau menghantar kolaj gambar yang hanya mengandungi balasan mesej WhatsApp berserta gambar Plaintif bersama kereta tersebut kepada satu kumpulan WhatsApp (WhatsApp Group) yang mana ahli-ahli kumpulan tersebut adalah hanya terdiri daripada rakan-rakan perniagaan saya.*

[34] SD1 also tried to be indifferent regarding this while answering the question posed by the learned counsel of the plaintiff during his

cross-examination:

[NOP, Part C pp. 28–29]

RM: Ya lah, encik tak dengar soalan saya. Soalan saya adalah, adakah encik membuat satu kolaj gambar menggunakan perkataan-perkataan dalam pertukaran dalam WhatsApp text exchange tadi yang saya rujuk, encik kata tak buat.

NATARAJ: Satu kolaj gambar, tapi bukan gambar ini.

RM: Gambar mana? Mana saya ada, saya tak rujuk encik kepada gambar-gambar pun. Saya Cuma menyatakan adakah encik membuat satu kolaj gambar —

NATARAJ: Ok.

RM: Menggunakan pertukaran WhatsApp diantara kamu dengan plaintiff?

NATARAJ: Ya.

RM: Ada buat?

NATARAJ: Ada buat, tapi, tapi bukan yang saya tengok dalam apa tu, tak ada lah

[NOP, Part C pp. 32–33]

RM: Ok. So, kalau saya, menurut keterangan Dato', Dato' berkata perkataan-perkataan yang berwarna merah di bahagian bawah ini, Dato' tak masukkan lah.

NATARAJ: Tak.

RM: Ok. Selain dari itu, memang betullah, Dato' yang buat.

NATARAJ: Ya kolaj ini

RM: Tapi yang merah ini, Dato' tak masukkan.

NATARAJ: Bukan kolaj ini, ada yang, gambar, gambar kereta pun macam saya tak pernah masukkan. Saya hanya masukkan yang ini sajalah.

RM: So, gambar kereta tak, tak masukkan?

NATARAJ: Tak, tak pasti.

RM: Mana tak pasti? (00:52:41 inaudible) dimasukkan atau tak dimasukkan?

NATARAJ: Kolaj ini betul. Tapi, tapi kolaj ini dieditkan oleh pihak ketiga, tak tahu siapa. Yang tulisan merah ini, bukan saya buat.

[35] I shall discuss the impugned posting in two separate versions: with and without the additional wordings. The impugned posting (without the additional wordings), among others, refers to the civil suit commenced by the defendant's company against the plaintiff's company. At the time of the trial of this claim, the civil suit in Shah Alam High Court was still ongoing. This is acknowledged by SD1 during cross-examination NOP, Part C pp 21–22.

[36] The additional wordings in their natural and ordinary meanings imply that the plaintiff is showing off his new car ie, Mercedes-Benz-Maybach car, despite his failure to pay his subcontractor. As mentioned earlier, there is no decision yet in the civil suit to support the purported failure of the plaintiff's company to pay the defendant's company. Surely, this, together with the bribery allegation and many other allegations constitute baseless accusations. Hence the plaintiff premised that the impugned posting in its natural and ordinary meaning is capable of being defamatory. To this I agree.

[37] The defendant has disputed as to the authorship of these additional wordings but admitted that the rest were indeed the collage made by him and sent by him to a WhatsApp messaging group. Even if I were to disregard the additional wordings and take the defendant's own admission with regard to the publication of the WhatsApp exchange messages by way of him putting such a collage in a WhatsApp messaging group, I still find that publication as such bears a defamatory tendency against the plaintiff. As discussed previously, one of the messages written by the defendant accused the plaintiff of bribing someone to delay the civil suit between the parties further. As articulated by Ian Chin J in *Raveychandran s/o Goonydo v Datuk Abdul Kadir Jasin & Anor and another action* [1997] MLJU 344; [1997] 3 CLJ Supp 68 accusing the plaintiff of trying to bribe would be to say that he is a despicable, dishonest, and immoral. In *Jones v Skelton* [1963] 3 All ER 952, the Privy Council had overruled the decision of the full court of the Supreme Court of New South Wales and held that the words conveying the meaning that the plaintiff had influenced his colleagues by bribery were capable of bearing a meaning defamatory to the plaintiff. Also, in the English Supreme Court case of *Denis O'Brien, plaintiff v Mirror Group Newspapers Ltd, Piers Morgan, Neil Leslie and Karl Brophy, defendants* [2001] 1 IR 1, the first defendant published an article which referred to an allegation that the plaintiff had made a donation to a certain politician and to controversy surrounding the award of a mobile telephone licence to a company of which the plaintiff was chairman. Keane CJ affirmed the earlier finding that the article published by the defendant has defamatory imputations.

[38] Hence, I agree with the plaintiff's submission that despite the absence of the additional wordings, the publication of the exchange messages between the plaintiff and the defendant remains defamatory.

[39] With that, I find that the defamatory claim against the defendant is indeed proven. Now, I will discuss on the defences raised by the defendant.

Defence of justification and/ or fair comment

[40] It is provided under O 78 r 3 of the Rules of Court 2012 that for the

defendant to raise the defence of justification and fair comment, he needs to specifically plead such defence. Order 78 r 3 is as mentioned below:

> 3 Obligations to give particulars (O 78 r 3)
>
> (1) ...
>
> (2) Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he must give particulars stating which of the words complained of the alleges are statements of fact and of the facts and matters he relies on his support of the allegation that the words are true.
>
> (3) Where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in his statement of claim give particulars of the facts on which he relies in support of the allegation of malice, but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, he must serve a reply given particulars of facts and matters from which the malice is to be inferred ...

[41] The defence of justification is also specified in s 8 of the Defamation Act 1957:

> An action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fair by reason only that the truth of every charge is not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

[42] This court accordingly refer to the Federal Court case of *Syarikat Bekalan Air Selangor Sdn Bhd v Tony Pua Kiam Wee* [2015] 6 MLJ 187 where it laid down that the burden is on the defendant to show that the defamatory imputations are substantially true. His Lordship Azahar Mohamed FCJ (now CJM) also referred to the English Court of Appeal case of *Lucas-Box v News Group Newspapers Ltd; Lucas-Box v Associated Newspapers Group plc and others* [1986] 1 All ER 177 and summarised that (at p 209):

> [51] In substance, the *Lucas-Box* plea of justification as decided by the English Court of Appeal is as follows:
>
> (a) if a plaintiff, in its defamation pleadings, gives a natural and ordinary meaning to the impugned words, the defendant may then rely on stating in his defence what he alleged was the natural and ordinary meaning of the words complained of; and
>
> (b) a defendant in defamation proceedings who wishes to rely on a plea of justification must make clear in the particulars of justification the case

which he is seeking to set up and must accordingly state clearly and explicitly the meaning which he seeks to justify.

[43] Likewise, in *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393 His Lordship Richard Malanjum J (as he then was) explained the defence of justification (at p 404):

> In a defamation action, the defence of justification is a complete defence if it succeeds. And the question of malice or bad faith does not arise. *But in order to succeed in the defence of justification a defendant must establish the truth of all the material statements in the words complained of which may include defamatory comments made therein*. And in order to justify such comments, it is *necessary to show that the comments are the correct imputations or conclusions to be drawn from the proved facts*. However, the plea of *justification does not fail 'by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges'* (see s 8 of the Defamation Act 1957 and *Abdul Rahman Talib v Seenivasagam & Anor* [1966] 2 MLJ 66.) *It is also to be noted that partial justification may be useful in the mitigation of damages.*
>
> Of course, the standard of proof required is on the balance of probabilities, and the burden of establishing the defence of justification is on a defendant.
>
> There is no burden on a plaintiff to prove that a defamatory statement is false. The law presumes that the defamatory words are false. (Emphasis added.)

[44] In the defendant's amended statement of defence, he relied on two defences: fair comment and justification. He submitted that the impugned posting, which consists of the conversation between the defendant and the plaintiff was justified and true because it was based on the civil suit. The defendant, in the defendant's amended statement of defence, listed the particulars of justification as follow:

> Butiran Pembelaan Justifikasi
>
> a. Defendan mengulangi kesuluruhan butiran dan kesuluruhan perenggan-perenggan di dalam Pembelaan Terpinda Semua yang di atas ini.
>
> b. Bahawa Plaintif telah menipu subkontraktor yang telah menjalakan kerja untuk syarikat Plaintif;
>
> c. Bahawa Plaintif menggunakan wang yang harus dibayar kepada subkontraktor untuk kegunaan sendiri khusunya untuk memperkayakan dirinya;
>
> d. Sekiranya perlu Defendan akan bergantung kepada Seksyen 8 Akta Fitnah, 1957

[45] Here, the plaintiff argued, and I agree, that other than the particulars in the pleadings, the defendant failed to provide any concrete evidence to support his defence of justification. All three points (a), (b) and (c) listed in the defendant's amended statement of defence are only insinuation and allegation that has yet to be proven in the civil suit. Furthermore, the failure of the defendant to either testify or to render any evidence on the suggestion of a 'bribe' by the plaintiff meant there was no such evidence of any corrupt practice by the plaintiff. How could there ever be justification to such baseless allegation?

[46] I refer to another High Court case of *Prem Anand Loganathan v Dhinagaran Jayabalan* [2016] MLJU 1149 where it was held that it is insufficient for the defendant in reliance of the defence of justification to merely establish that he received the information from a businesswoman that the plaintiff had sought and obtained a bribe from her and in addition thereto received a related VCF from her. The defendant has to go on further to establish that it was true that the plaintiff indeed sought and obtained a bribe from that businesswoman.

[47] In a similar vein, the defendant has failed to establish anything to prove the serious allegation of bribe in this case. Thus, there is nothing justifying such defamatory remark.

[48] The same goes to the alleged defence of fair comment. I do not find the defendant having any basis or ground to raise this defence. The defendant alleged that the impugned posting was to bring awareness of the plaintiff's action in respect of the civil suit. Again, with due respect, I disagree.

[49] Unlike justification, the defence of fair comment concerns the protection of comments rather than facts. However, such comments are only available based on facts proven to be true. As highlighted by Lim Beng Choon J in *Institute of Commercial Management United Kingdom v New Straits Times Press (Malaysia) Bhd* [1993] 1 MLJ 408, where the ration Lord Porter in *Turner v Metro-Goldwyn Mayer Pictures Ltd* was quoted: 'if the communication were a statement of facts and the facts were untrue, a plea of fair comment would not avail.

[50] The defence of fair comment is also stated in s 9 of the Defamation Act 1957:

> In any action of libel or slander in respect of word consisting partly of allegation of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

[51] In the Court of Appeal case of *Dato' Sri Dr Mohamad Salleh bin Ismail & Anor v Nurul Izzah bt Anwar & Anor* [2018] 3 MLJ 726 where His Lordship Abang Iskandar JCA (as he then was) at pp 745–746:

> [58] As for fair comment, the law on the defence of fair comment amounts to this. *If a defendant can prove that the defamatory statement is an expression of opinion on a matter of public interest and not a statement of fact, he or she can rely on the defence of fair comment.* The courts have said that whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on or what may happen to them or to others, then it is a matter a public interest on which everyone is entitled to make fair comment. *It is also a requirement that the comment must be based on true facts which are either contained in the publication or are sufficiently referred to. It is for the defendant to prove that the underlying facts are true. If he or she is unable to do so, then the defence will fail. As with justification, the defendant does not have to prove the truth of every fact provided the comment was fair in relation to those facts which are proved.* However, 'fair' in this context, does not mean reasonable, but rather, it signifies the *absence of malice.* The views expressed can be exaggerated, obstinate or prejudiced, provided they are honestly held (see the case of *Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor* [2014] 4 MLJ 242; [2014] 3 CLJ 560). (Emphasis added.)

[52] In *JB Jeyaretnam v Goh Chok Thong* [1985] 1 MLJ 334 at p 338, LP Thean J held that the party relying on the defence of fair comment must establish the following elements:

(a) the words complained of are comment, although they may consist of or include inferences of fact;

(b) the comment is on a matter of public interest;

(c) the comment is based on fact; and

(d) the comment is one which a fair-minded person can honestly make on the facts proved.

[53] The defendant, in his defence, further averred in para 35 that:

> Butiran Pembelaan Komen Berpatutan
>
> i. Defendan bersandarkan kepada pembelaan berpatutan 'fair comment' dari segi isi dan fakta di bawah Seksyen 9 Akta Fitnah 1957
>
> ii. Defendan mengulangi perenggan 1 hingga 30 pernyataan Pembelaan Terpinda Semua yang di atas ini.

[54] Here, the defendant contended that the impugned posting is a matter of public interest to ensure that the public knows the plaintiff's action in the civil suit. Besides, there is nothing much on this defence raised by the defendant. Similar with the defence of justification, I do not find any reason why the defence of fair comment should be allowed. How could a veiled remark about

plaintiff bribing the court staff be accepted under the fair comment defence without any proof evidencing the same? Such bare and irresponsible allegation and remark cannot be accepted as fair comment without proof otherwise this will definitely open the floodgate of any shameless attack on any litigants in general and on the judicial system of the country in particular.

[55] The plaintiff also contended that the defendant had failed to make any particularisation on which comment or opinion he referred to as required under O 78 r 3(2) of the Rules of Court 2012. The plaintiff further cited the Court of Appeal case of *Dato' Sri Mohd Najib bin Tun Hj Abdul Razak & Anor v Mohd Rafizi Ramli and another appeal* [2018] 1 MLJ 295 where Her Ladyship Rohana Yusuf JCA (now PCA) held as follows:

> [21] Of course when a comment is based upon facts, it cannot be on the facts invented by the maker himself. It must rest upon facts which are presumed to *be true. If the fact never exists, then the defence must fail.* In line with this requirement, O 78 r 3(2) provides for the procedural requisite for particularisation of the facts relied upon in support of any comment or opinion. The defendants here are duty bound to particularise what are the facts relied upon in order to support that the allegations made are their true beliefs or opinions, and not to leave to the plaintiffs and finally the court to speculate, pick and choose for them. (Emphasis added.)

[56] Adding to the defendant's failure, as previously discussed, the impugned posting was merely allegations and suggestions without any evidence or corroboration to support his statement. It is trite that the defence of fair comment will fail if the defendant cannot prove that the facts on which the comment is formed are true (see *Hasnul bin Abdul Hadi v Bulat bin Mohamed* [1978] 1 MLJ 75).

[57] In *Chua Jui Meng v Hoo Kok Wing & Anor* [2000] 3 MLJ 1, the High Court dismissed the defendant's defence of fair comment and held that (at p 14):

> Thus, the first issue is whether the allegations made by the first defendant were comments upon facts or whether they were allegations of fact. In *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371, the Court of Appeal said at p 376 as follows:
>
> > It is an elementary principle of the law of defamation that for fair comment to succeed the facts upon which comment is made must be true, or if untrue, must have been published on a privileged occasion.
>
> *It is therefore clear from the circumstances of this case that none of the first defendant's impugned allegations against the plaintiff have been proven to be a fact. The first defendant led no evidence to prove as fact, any element of the impugned allegations that he made. In the circumstances, I am satisfied that the defence of fair comment must necessarily and that therefore the question of public interest does not arise…* (Emphasis added.)

[58] In the same vein, in the present case, the defendant cannot prove and had not adduce any evidence to establish that the plaintiff had lied to his subcontractor, bribed someone from the court staff to delay the civil suit and that the plaintiff had used the money to pay his subcontractor for his own use. Not to mention that at the time the impugned posting was created and forwarded, the civil suit was still ongoing. Accordingly, the defence of fair comment cannot stand.

[59] I further find that the impugned posting does not even remotely confer any matter of public interest. I refer to Federal Court case of *Henry Wong Jan Fook v John Lee & Anor* [1976] 1 MLJ 231 where it was held by His Lordship Suffian LP that the defence of fair comment cannot be on any matter but must be on some matter of public interest.

[60] As alluded previously, the civil suit is still pending when this claim is heard. Thus, the impugned posting is still mere speculation and allegation without basis. Looking at the WhatsApp messages exchange in the impugned posting, I understand the defendant's frustration. However, he should be more responsible for anything he posted or made or, in this case, sent to WhatsApp groups. I share my sentiment with Kamalanathan Ratnam J in *Chua Jui Meng* where he dismissed the defendant's defence of fair comment and said, 'It can never be in the public interest for scurrilous untruths to be irresponsibly and wantonly thrown against the plaintiff'. Consequently, the defendant is digging his own grave by creating the impugned posting and uploading it on the DG chat group.

[61] Thus, based on the above authorities and discussion, it is my finding that both defence of justification and fair comment cannot stand.

Damages

[62] Having dismissed the defences raised by the defendant, the remaining question is with regard to the quantum of damaged that the plaintiff is entitled to due to the picture collage. I find great guidance from the Court of Appeal case of *Mahadevi Nadchatiram v Thiruchelvasegaram Manickavasegar* [2001] 3 CLJ 65 where His Lordship Haidar Mohd Noor JCA (as he then was) held (at p 96) that in considering an award for damages for defamation the established factors set out by the Federal Court in *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [1995] 2 MLJ 493; [1995] 2 CLJ 912 should be observed, namely:

(a) the position and standing of the plaintiff;

(b) the extent of the publication;

(c) the mental distress, hurt, anxiety and mental anguish caused to the plaintiff as a result of the libel;

(d) the uncertainty undergone in the litigation;

(e) the conduct of the defendant from the time of the libel down to the very moment of the verdict; and

(f) the absence and refusal of correction, retraction, or apology.

[63] Likewise, in the recent Federal Court decision in *Datuk Harris Mohd Salleh v Datuk Yong Teck Lee (sued in his personal capacity and as an officer of the second respondent) & Anor* [2017] 6 MLJ 133; [2018] 1 CLJ 145 it was decided (at p 190 (MLJ); p 213 (CLJ)):

> [82] In the present appeal, the learned trial judge had considered the *seriousness of the libel, the extent of the publication, the plaintiff's reputation and the adverse effect of the defamatory statements on his dignity and reputation, and the conduct of the defendants including absence of remorse for defaming the plaintiff and in urging the court not to award any damages or costs to the plaintiff, all of which the learned trial judge was entitled to take into account in assessing damages*. Then, there is the award in *MGG Pillai*'s case which we have to put into the scale to consider the award made by the learned trial judge. Whilst we are not prepared to share the Court of Appeal's view that the learned trial judge had not been influenced by the award in *MGG Pillai*, he would have awarded the global sum of RM1m to the plaintiff for compensatory, aggravated, and exemplary damages. This, in our view, warrants appellate interference. (Emphasis added.)

[64] The plaintiff, in his witness statement, had listed out numerous positions that he has held under the Eversendai Group of Companies which have businesses internationally. The most notable position would be that he is the founder, Chairman, and the Group Managing Director of the said group of companies which has its footings worldwide. He has also been awarded 'the Darjah Kebesaran Panglima Setia Mahkota (PSM) which entitles him to carry the honourable title of a 'Tan Sri'. He was interviewed in numerous mainstream media and social media. Thus, I would conclude that the plaintiff is indeed a reputable and respectable man in the society especially in his professional and business circles and markets.

[65] The defendant then raised a point that no evidence has been adduced to suggest saying that the plaintiff's reputation had taken a hit because of the impugned posting. Here, again, I disagree. Defamation law is trite that one man's reputation is always presumed to be good, and a plaintiff is not required to prove his reputation, or to prove that he has suffered any actual loss or damage. Hence, there is no need for the plaintiff to prove to this court the actual reputational damages that he suffered due to the impugned posting.

[66] As narrated by His Lordship Abang Iskandar JCA (now CJSS) in *Dato' Sri Dr Mohamad Salleh bin Ismail & Anor v Nurul Izzah bt Anwar & Anor* [2018] 3 MLJ 726 at para [47]:

> ... A plaintiff in a defamation suit is aggrieved because the falsity of the allegation has caused adverse implications on his reputation such that damages must flow from the defendant on successful proof by the plaintiff of the alleged defamation.

[67] In *MGG Pillay* the appellants argued that the respondent had failed to prove the damage he suffered from the libel statement. However, the Court of Appeal held that there was no need to proof actual harm in a libel action. His Lordship Gopal Sri Ram JCA (as he then was) stated at p 516 (MLJ); p 516 (CLJ) that:

> Libel is a tort actionable per se, ie without proof of actual harm. In other words, damage is not an ingredient of the tort. The law presumes that when a man's reputation is assailed, some damage must result. Evidence about the extent of that damage is admissible. But evidence that purely speculates is not. That, in a gist, is the effect of the passage cited.

[68] For the avoidance of repetition, it is my finding that the gravity of the allegation posed by the defendant towards the plaintiff is severe especially his professional reputation. As confined by the English Court of Appeal in *John v MGN Ltd* [1997] QB 586 at p 607:

> In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel *the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be.* (Emphasis added.)

[69] On that account, the allegations conveyed in the impugned posting (even without the additional wordings) including the accusation of 'bribery' are to my mind a grave and degrading accusation and undeniably touches the plaintiff's integrity, credibility, and personal and professional reputation. Such reputational damages would undoubtably causes detriment to the plaintiff's dealings locally and internationally.

[70] Another matter this court need to consider is the extent of publication. Here, I agree with the plaintiff's submission that the impugned posting can be presumed to have reached a large audience. This is because the DG chat group has approximately 200 participants and consists of the defendant's business friends. SD1 affirmed this during his cross-examination:

> [NOP, Part C p. 38]
>
> RM: Kamu adalah salah seorang dari 200 lebih peserta dalam DG WhatsApp chat group tersebut. Kamu setuju?
>
> NATARAJ: Ya

[71] Hence, it is safe to say that this is not a 'limited' publication as

submitted by the defendant by relying on the case of *Tan Sri David Chiu Tat-Cheong v Seema Elizabeth Isoy* [2021] MLJU 1426 where the impugned text was not widely exploited as it was only restricted to about 55 participants in a private WhatsApp group. However, unlike *Tan Sri David Chiu Tat*, the defendant had posted the impugned posting to a WhatsApp group with over 200 participants. That is far cry from 55 participants in *Tan Sri David Chiu Tat*. In his submission, the defendant had the audacity to say that the plaintiff brought the private publication into the public eye when he brought this claim. The defendant could not be more wrong. If such allegations and excuses were to be accepted, all plaintiffs in any defamation cases would be without any recourses and must sit idle and suffer in silent and never react to any defamatory statements made against them!!

[72] As expressly admitted by the defendant, he is the creator of the impugned posting which includes the 'private' conversation between him and the plaintiff to the DG chat group. Not the other way round. His thoughtless and irresponsible action resulted in this claim being brought against him. Therefore, it is not for the defendant to shift the blame to the plaintiff now.

CONCLUSION

[73] To sum up, this court find that the plaintiff has proven that the impugned posting is defamatory against him. Even if this court were to expunge the additional wordings from the impugned posting, the fact remains that by reading the exchange messages of the parties there are defamatory words, meaning and phrases in them. The defendant has admitted in putting all these exchanges in the collage and published it. Although he tried to deny that publishing it in the DG WhatsApp Group, the group administrator has confirmed this. Thus, the plaintiff has established his case on the balance of probabilities. Based on the aforesaid reasons, it is my order that judgment is hereby entered against the defendant for the following:

(a) global damages of RM200,000 to be paid by the defendant to the plaintiff;

(b) interest on damages awarded at the rate of 5%pa from the date of judgment to the date of full settlement;

(c) a full and unequivocal written public retraction and apology to be published by the defendant in *The Star* in both its print and online editions within 14 days from the date of judgment on terms to be approved by the plaintiff beforehand;

(d) an injunction to restrain the defendant, whether by himself, his servants, associates, agents, and/or his representatives from further writing, producing, posting and/or publishing and/or writing, causing to be produced, posed and/or published or otherwise procuring to be written,

producing, posting and/or publishing the impugned posting containing the words complained or other words similar in meaning defamatory of the plaintiff; and

(e) costs.

Plaintiff's claim allowed.

Reported by Ashok Kumar